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March 28, 2008

FILED/ACCEPTED

MAR 2 8 2008

Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re: *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*; WC Docket. No. 08-24

Dear Ms. Dortch:

On behalf of One Communications Corp., Time Warner Telecom Inc., Integra Telecom, Inc., and Cbeyond Inc., please find enclosed two copies of a redacted version of an Opposition to the petition filed in the above referenced proceeding. Pursuant to the Second Protective Order in this proceeding,[1] two copies of a highly confidential version of this Opposition will also be filed with Gary Remondino and one copy of the highly confidential version will be provided electronically to Tim Stelzig and Denise Coca. Two redacted copies will be filed with the Secretary's Office, one redacted copy will be filed on the ECFS, and one redacted copy will be provided electronically to the Competition Policy Division and Best Copy and Printing, Inc.

Please let us know if you have any questions with respect to this submission.

[1] *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, Second Protective Order, 23 FCC Rcd. 2852 (2008).

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Respectfully submitted,

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Attorneys for One Communications Corp., Time Warner Telecom Inc., Integra Telecom, Inc., and Cbeyond Inc.

Enclosures

cc: Best Copy and Printing, Inc. (via e-mail to fcc@bcpiweb.com)
Competition Policy Division (via e-mail to CPDcopies@fcc.gov)

REDACTED – FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Petition of Verizon New England for	)	WC Docket No. 08-24
Forbearance Pursuant to 47 U.S.C. § 160(c)	)	
in Rhode Island	)	
	)	
	)	

OPPOSITION OF ONE COMMUNICATIONS CORP., TIME WARNER TELECOM INC., INTEGRA TELECOM, INC., AND CBEYOND INC.

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OPPOSITION OF ONE COMMUNICATIONS CORP., TIME WARNER TELECOM INC., INTEGRA TELECOM, INC., AND CBEYOND INC.

One Communications Corp. ("One Communications"), Time Warner Telecom Inc. ("TWTC"),[1] Integra Telecom, Inc. ("Integra"), and Cbeyond Inc. ("Cbeyond") (collectively, the "Joint Commenters"), by their attorneys, oppose the petition for forbearance from unbundling and other regulations filed by Verizon New England ("Verizon") in the above referenced docket ("Petition").[2] As discussed below, the Joint Commenters oppose Verizon's Petition to the extent that it seeks forbearance from unbundling and other regulations governing access to Verizon local loop and transport facilities needed to serve business customers.

I. INTRODUCTION AND SUMMARY.

In filing its petition for forbearance from dominant carrier and unbundling regulations in Rhode Island, Verizon has demonstrated both its astonishing sense of entitlement and the

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[1] Time Warner Telecom Inc. amended its Certificate of Incorporation effective March 12, 2008 to change its name to tw telecom inc. in preparation for a broader name change that will be effective July 1, 2008. The company will continue to use and be known as Time Warner Telecom Inc., its trade name, until July 1, 2008.

[2] *See Pleading Cycle Established For Comments On Verizon New England's* Petition *For Forbearance In Rhode Island*, Public Notice, DA 08-469 (rel. Feb. 27, 2008).

fundamental flaws with the forbearance process. Verizon filed the instant petition less than three and a half months after the Commission unanimously denied Verizon's petition seeking forbearance from exactly the same regulations in almost exactly the same geographic area (the Providence metropolitan statistical area ("MSA")) at issue in the Rhode Island petition. The Commission reached this conclusion based on an analysis of almost exactly the same market evidence that Verizon proffers in support of the Rhode Island petition. Verizon apparently believes, however, that it has so much political throw-weight that it can bully the Commission into changing the Commission's forbearance standard so that the same facts that were insufficient to satisfy the forbearance test last time, will be sufficient to satisfy the test this time. Of course it is the forbearance provision itself, and the absence of meaningful procedural regulations governing forbearance petitions more generally, that offer Verizon the opportunity to file and refile essentially the same petitions in an attempt to wear down the Commission and force it eventually to grant the relief sought.

The Commission must not allow itself to be strong-armed and manipulated in this fashion. As the Joint Commenters, and other CLECs, explained in their pending Motion to Dismiss, the Commission need not and should not even address Verizon's arguments. Basic principles of issue preclusion should prevent Verizon from seeking the same relief based on the same facts in multiple petitions. By dismissing the petition based on these principles, the Commission can go some way toward rationalizing and controlling the forbearance process.

If it does consider the merits of the Rhode Island petition, the Commission must ensure that it utilizes a sound analytical framework. The Commission should reject Verizon's suggestion that the Commission should change the relevant geographic markets used in the forbearance analysis. For example, there is no basis for Verizon's assertion that the Commission

should assess competitors' market share in the state of Rhode Island, rather than (as Verizon previously proposed) on an MSA-by-MSA basis. Verizon has no reason for proposing this change other than that there is purportedly more facilities-based competition in Rhode Island than in other parts of the Providence MSA. But the Commission must choose geographic markets based on a principle other than a petitioner's gerrymandering in order to have its petition granted. MSAs are coherent, integrated population centers, and the Commission has at least twice held that competitors plan their entry on an MSA-by-MSA basis. Verizon has offered no reason to doubt that this is correct or that MSAs remain the appropriate geographic market for considering market share. There is also no reason to adopt Verizon's proposal that the Commission utilize rate centers instead of wire centers when assessing network coverage. Wire centers, which the Commission has used in the past, are smaller than rate centers and are therefore likely to yield more reliable assessments of facilities deployment.

The Commission should, however, modify the manner in which it measures competitors' market share and network coverage to accord with sound competition policy. In particular, the Commission should revisit its conclusion that wireless telephone services should be considered in the same product market as wireline services. The Commission did not even analyze this issue in the *6 MSA Order* and instead merely relied on its prior "analysis" in the *Verizon/MCI Merger Order*. But in the *Verizon/MCI Order*, the Commission candidly acknowledged that, for most customers, wireless and wireline services do not have a price constraining effect on each other and that only "some customers" find that "mobile wireless services are a good substitute for wireline services." Small amounts of substitution exist between many products that do not belong in the same product market under the well-established principles set forth in the DOJ/FTC Merger Guidelines that the Commission has applied in the past. Indeed, a recent

survey that Verizon touts on its own website found that fully 83 percent of current wireline subscribers plan to continue to subscribe to wireline service "indefinitely" because of the superior reliability and emergency access capabilities of wireline service. This information alone should cause the Commission to exclude wireless service from the wireline market definition.

In addition, the Commission must modify its analytical framework in other ways as well. It should not include customers served *via* Wholesale Advantage in the "competitors'" market share, since Wholesale Advantage loop prices are constrained by the availability of unbundled loops for which Verizon seeks forbearance. Moreover, it is imperative that the Commission conduct a separate market share analysis for the business market when considering whether to retain unbundling requirements DS-1 and DS-3 loops needed to serve businesses.

The Commission should reject Verizon's proposals to skew the market share and coverage measures in favor of forbearance. The Commission should reject Verizon's argument that market share is irrelevant. It is obviously appropriate for the Commission to consider the extent to which facilities-based competitors have been successful in competing when assessing whether UNEs remain necessary to protect consumers and to ensure reasonable rates. The Commission should reject Verizon's suggestion that customers that cut-the-cord in favor of Verizon Wireless should be counted as won by competitors or removed entirely from the analysis. The Commission has found that ILECs have powerful incentives to favor their wireless affiliates and to view wireline and wireless services as offerings of a single, integrated firm. Verizon has offered no basis for revisiting this conclusion. The Commission should reject Verizon's argument that competitors served *via* special access should be included in competitors' market share since, as the Commission has found, Verizon's special access prices are constrained by the availability of the UNEs for which Verizon seeks forbearance. In addition, the

Commission should again reject Verizon's argument that VoIP over-the-top customers should be included in competitors' market share. The Commission rejected this proposal in the *6 MSA Order*, and Verizon has offered no basis for revisiting this issue.

Even under the standard as applied in the *6 MSA Order*, Verizon cannot demonstrate that competition in Rhode Island is sufficient to justify forbearance. Indeed, none of the information submitted by Verizon regarding market share or network coverage is reliable or persuasive. Verizon relies on white pages as a proxy for access lines to measure market share and, in so doing, it assumes that Cox has the same 1:1 residential access line-to-white page listings ratio as Verizon. But there is no basis for this assumption. Qwest has stated that only 75 percent of its residential access lines have white page listings. If there is a 25 percent differential in the residential access line-to-white page listing ratio between Verizon and Qwest, a similarly large differential likely exists between and among Verizon, Cox and other competitors. This is simply too large a margin to make white pages a reliable proxy for access lines. But even if Verizon's market share data is accurate, it is of the same vintage as the market share data the Commission deemed insufficient to justify forbearance in its review of the Providence MSA petition, thus warranting the same result here.

Furthermore, to the extent that the Commission considers cut-the-cord customers in its market share analysis, it should not accept Verizon's argument that 13.6 percent of Rhode Island residents have cut the cord. Verizon relies on a national survey by the Center for Disease Control (CDC) for this proposition, but that same study found that only 8.8 of residents in the Northeast (including Rhode Island) have cut the cord. Indeed, the demographic makeup of Rhode Island indicates that the percentage could be even lower in that state. In all events, the

most appropriate means of counting cut-the-cord percentages in Rhode Island is to rely on the actual number of customers that have cut the cord—a figure absent in the record.

Verizon has also failed to proffer information necessary to show that competitors satisfy the network coverage test applied by the Commission. Under that test, the Commission determines whether competitors' facilities-based networks reach 75 percent of all residential and business end user locations in a wire center. But Verizon has only submitted information concerning Cox's network coverage among residential end users. This is clearly insufficient.

Perhaps the clearest illustration of the absence of competition in Rhode Island is the manner in which Verizon has exercised its market power in the provision of services to business customers. A review of Verizon's state tariff filings reveals that Verizon has repeatedly increased rates for services demanded by business customers. It has done so while DS-1 and DS-3 loops and transport facilities are available as UNEs. If those facilities are no longer available as UNEs, Verizon will have even greater freedom to unilaterally increase prices. Not surprisingly, Verizon is not able to offer any substantial evidence that either cable companies or traditional CLECs offer meaningful facilities-based competition in the business market.

Finally, the Commission should reject Verizon's argument that the Commission must grant forbearance for any network elements for which the Commission determines that competitors are unimpaired in this proceeding. The Commission has held that it does not even have the authority to make impairment determinations in a forbearance proceeding; it can only make such determinations in a rulemaking proceeding. In a forbearance proceeding such as this, the Commission must apply the forbearance standard. Verizon's argument is therefore irrelevant to this proceeding.

II. THERE IS NO BASIS FOR DEPARTING FROM THE FCC'S PRECEDENT OF USING METROPOLITAN STATISTICAL AREAS ("MSAs") AND WIRE CENTERS AS RELEVANT GEOGRAPHIC MARKETS.

In considering whether to grant past petitions for forbearance from dominant carrier regulation for switched access and loop and transport unbundling requirements, the FCC has consistently considered competitors' market share on an MSA-basis and competitors' facilities coverage on a wire center basis. Verizon has provided no basis for departing from this practice in the instant proceeding.

A. The FCC Should Continue to Utilize The MSA As The Appropriate Geographic Market For Which To Assess Market Share Data.

Notwithstanding its vigorous support for the MSA as the relevant geographic market in the past, Verizon now argues that the state of Rhode Island is preferable to the Providence MSA as the relevant geographic market for purposes of forbearance analysis, because "Rhode Island is served by a different cable operator (Cox) than the Massachusetts part of the Providence MSA (Comcast)." Petition at 4. Verizon no doubt seeks to exclude Comcast and the Massachusetts portion of the Providence MSA from the forbearance analysis because the FCC found in the *6-MSA Order* that Comcast does not yet compete in the business market, does not meet the coverage test in many wire centers, and is below the market share threshold in the Providence MSA.[3] But advancing Verizon's narrow commercial interest cannot be the basis for changing the relevant geographic market in forbearance proceedings.

At its most basic level, Verizon's proposal is that the Commission should gerrymander the contours of the relevant geographic market for purposes of assessing market share to include

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[3] *See* Petitions *of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd. 21293, nn.90 & 116 (2007) ("*6-MSA Order*").

only areas where competition is greatest. Taken to its logical extreme, this would mean that the FCC should use any contiguous geographic area (e.g., a 100-mile long, 3-mile wide highway corridor with a large concentration of businesses) where Verizon believes it can satisfy the market share standard. This kind of result-oriented geographic market definition is inappropriate. Geographic markets should instead be defined based on objective criteria suitable to promoting reasoned decision-making in the relevant context.

The FCC's use of MSAs clearly satisfies this standard, as Verizon has acknowledged up to now. The FCC has utilized MSA geographic markets in past unbundling orders, because doing so permits the FCC to assess competition in an integrated economic area. The Office of Management and Budget describes an MSA as "an area containing a recognized population nucleus and adjacent communities that have a high degree of integration with that nucleus."[4] The integrated nature of the communities within an MSA means that customer demand for telecommunications services among multiple location businesses is often concentrated in the MSA (for example, branches of local restaurant and retail chains are often concentrated within an MSA). Moreover, media used for advertising services (such as newspapers, local television and radio stations) also tend to concentrate their coverage on most or all of an MSA. It is logical, therefore, for telecommunications carriers to enter markets on an MSA-basis where possible because doing so enables them to offer services to all of the locations of local, multi-location businesses and to advertise the availability of such services efficiently.

In light of factors such as these, the FCC has held that carriers are likely to enter the market on an MSA-basis and it has designed its regulatory framework to account for this reality.

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[4] OMB, *Standards for Defining Metropolitan and Micropolitan Statistical Areas*, 65 F.R. 82228 (Dec. 27, 2000), *available at* http://www.census.gov/population/www/estimates/00-32997.pdf.

For example, in the special access *Pricing Flexibility Order*, the Commission rejected the RBOCs' arguments that pricing flexibility should be granted on a state-wide basis and adopted an MSA approach because the FCC "agre[ed] with those commenters that maintain[ed] that MSAs *best reflect the scope of competitive entry,* and therefore are a logical basis for measuring the extent of competition."[5] The FCC mandated that carriers provide local number portability on an MSA-by-MSA basis for the same reason.[6]

The Providence market seems to demonstrate the soundness of this conclusion. For example, carriers that serve Providence proper are also likely to serve the eastern areas of the Providence MSA that are in Massachusetts (i.e., Bristol County, Massachusetts). As the attached map shows, Bristol County, Massachusetts abuts Rhode Island and is located just to the east of Providence, within just three or four miles of the Providence city limits.[7] Bristol County, Massachusetts includes urbanized population centers, including the cities of Fall River, Attleboro and North Attleboro, that are economically integrated with Providence. One Communications serves both the city of Providence and customers in Bristol County. Primarily because of the geographic proximity of these Massachusetts communities to Providence rather than Boston, One Communications' sales and marketing activity treat Bristol County, Massachusetts as part of

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[5] *Access Charge Reform et al.,* Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 72 (1999) (emphasis added).

[6] *Telephone Number Portability*, First Report & Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 ¶ 82 (1996). ("Thus, our deployment schedule is designed to ensure that number portability will be made available in those regions where competing service providers are likely to offer alternative services. We believe that competitive local service providers are likely to be providing service in the major metropolitan areas soon.").

[7] *See* Bristol County, Massachusetts map, http://www.massvacation.com/getAround/maps/bristolmap-4.pdf (attached hereto as Attachment A).

the overall Providence/Southeastern Massachusetts market, not the Boston market to the northeast.

Other evidence indicates that Bristol County, Massachusetts and Providence are tightly connected. The transit map of the area shows that the mass transit systems of Rhode Island and Bristol County, MA are integrated, while vast areas of Rhode Island are not served by mass transit, suggesting that Providence and Bristol County, MA are more economically connected than Providence and other portions of Rhode Island.[8] Moreover, the Providence Nielsen Designated Market Area covers the same area as the Providence MSA, demonstrating that the entire MSA is a single integrated media market.[9]

The fact that the dominant cable operator in the Providence MSA has not extended its network to cover the entire MSA does not counsel against using MSAs as the relevant geographic market. Cable companies have generally sought to "cluster" their systems in order to take advantage of the efficiencies of providing service in an integrated community. The large cable operators have used mergers and system swaps to pursue this objective aggressively.[10] The fact that Cox has not achieved a level of concentration throughout the entire Providence MSA

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[8] *See* Rhode Island transit map, http://www.ripta.com/maps/download_full_image.php/id/1306 (last visited Mar. 28, 2008) (attached hereto as Attachment B).

[9] *See* Backchannelmedia, http://research.backchannelmedia.com/dma/show/Providence-New_Bedford (last visited at Mar. 28, 2008).

[10] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee,* Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 114 (2006) (discussing the public interest benefits and harms of cable system clustering).

(yet) in no way diminishes the basic logic underlying the use of MSAs as the relevant geographic market for purposes of assessing market share.

B. Consistent With Precedent, The FCC Should Continue To Utilize Wire Centers Rather Than Rate Centers In Analyzing Network Coverage.

Verizon argues that the Commission should also depart from prior precedent by using rate centers, rather than wire centers, to evaluate the "coverage" prong of the forbearance test. The Commission should reject this proposal.

In the *TRRO* and in later UNE forbearance orders, the FCC consistently used wire center geographic markets for assessing the level of competitive facilities deployment because a wire-center based analysis permitted an appropriately granular review.[11] The FCC acknowledged in the *TRRO* that a building-by-building analysis would be a more accurate predictor of where loop deployment was possible, but it concluded that it was not feasible to conduct such an analysis on a nationwide basis. *See TRRO* ¶ 161. Given that these administrative concerns are not as great when examining a single MSA (rather than the entire country as the Commission did in the *TRRO*), if the FCC were to alter the scope of the relevant geographic market for purposes of assessing network coverage, it should examine areas *smaller* than wire centers. But rate centers are *larger* than wire centers (Verizon states that the 24 rate centers, excluding Block Island, in Rhode Island are comprised of 29 wire centers). *See* Petition at 8.

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[11] *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 155 ("*TRRO*") ("Although we recognize that such a test may in some cases be under-inclusive (denying unbundling in specific buildings where competitive entry is not in fact economic) or over-inclusive (requiring unbundling in specific buildings where competitive entry is in fact economic), we conclude that this approach strikes the appropriate balance and responds to the concerns expressed by the court in *USTA II*."). *See also* Petition *of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion & Order, 20 FCC Rcd. 19415 n.129 (2005) ("*Omaha Order*").

Verizon offers no basis for questioning this conclusion. It argues that a rate center approach is appropriate because Cox "delineates its coverage areas by rate centers," noting that Cox's website indicates that Cox "provides separate toll-free calling areas for each of the 24 exchanges (or rate centers) in the state of Rhode Island." *Id.* at 7-8. While it may be the case that in at least one instance Cox advertises its service area on a rate center basis, this has no bearing on whether Cox is capable of providing information on the extent to which its facilities meet the 75 percent coverage test on a wire center basis. For example, Cox provided wire center-by-wire center coverage data in the 6-MSA proceeding for the Providence and Virginia Beach MSAs and in the Omaha proceeding soon after the FCC requested the information.[12]

III. THE COMMISSION SHOULD MODIFY THE MANNER IN WHICH IT MEASURES COMPETITORS' MARKET SHARE AND NETWORK COVERAGE TO ACCORD WITH SOUND COMPETITION ANALYSIS.

Although the Commission has utilized sound geographic markets in its forbearance analysis, other aspects of the Commission's analytical framework for assessing ILEC unbundling forbearance requests have been seriously flawed. Most importantly, as the Joint Commenters have explained in previous filings, the Commission has failed to account for fundamental differences in product markets, it has failed to consistently apply geographic markets, and it has failed to conduct a meaningful analysis of competition in the wholesale market. Rather than repeat those arguments here, the Joint Commenters have attached hereto prior filings that explain the appropriate analytical framework for Commission consideration of forbearance petitions seeking the elimination of unbundling.[13] As explained below, however, there are several

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[12] *See, e.g.,* Letter from J. G. Harrington, Counsel, Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172, at 2 (filed Oct. 30, 2007).

[13] *See* Opposition of Time Warner Telecom et al., WC Dkt. No. 06-172 (filed Mar. 5, 2007) ("6-MSA Opposition") (attached hereto as Attachment C);Opposition of Time Warner Telecom et

additional modifications that the Commission should make to the forbearance framework applied in the *6 MSA Order*.

A. Mobile Wireless Service Should Not Be Included In The Same Product Market As Wireline Voice Service And Therefore Should Be Excluded From The Market Share Analysis Completely.

The FCC should reassess its conclusions in the *6-MSA Order* that wireless service can serve as a replacement for wireline phone service and that cut-the-cord customers should be considered in the market share analysis. The Commission reached these conclusions without analyzing whether wireless and wireline services belong in the same product market, and all indications are that they do not belong in the same market.

The FCC generally follows the DOJ/FTC merger guidelines when analyzing whether two products belong in the same product market.[14] Pursuant to the merger guidelines, a relevant product market is "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price."[15] It is often

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al., WC Dkt. No. 07-97 (filed Aug. 31, 2007) ("Qwest 4-MSA Opposition") (attached hereto as Attachment D).

[14] *See Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, n.83 (2005) ("*Verizon/MCI Merger Order*"); *Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion & Order, 20 FCC Rcd. 13967, ¶ 39 (2005) ("*Sprint/Nextel Merger Order*").

[15] DOJ & FTC, Horizontal Merger Guidelines, 57 F.R. 41552, §1.11 (1992) (rev. Apr. 8, 1997) ("Merger Guidelines"); *see id.* ("That is, assuming that buyers likely would respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If the alternatives were, in the aggregate, sufficiently attractive at their existing terms of sale, an attempt to raise prices would result in a reduction of sales large enough that the price increase would not prove profitable, and the tentatively identified product group would prove to be too narrow."). The Merger Guidelines also define the relevant market as the narrowest set of products or services that meet the criteria. *See id.* § 1.0.

profitable for a monopolist to impose a nontransitory price increase on customers, even if this causes some customers to switch to other services. In other words, the monopolist will increase prices so long as the resulting loss of customers is outweighed by profits gained from increasing prices paid by those customers that continue to purchase the service in question. It is clear, therefore, that the existence of some cross-demand elasticity (e.g., "cutting the cord") between products does not mean that they belong in the same product market.

Rather than apply this well-established principle, and the merger guidelines more generally, in the *6-MSA Order*, the Commission simply relied on the analysis in the *Verizon/MCI Merger Order* and *AT&T/BellSouth Merger Order* (*see 6-MSA Order* n.89) to support its inclusion of wireless services in the same product market as wireline services. But these two *Merger Orders* hardly provide a firm analytical foundation for the Commission's conclusion in the *6-MSA Order*. Indeed, in the *Verizon/MCI Merger Order*, the Commission cited without question or criticism to its conclusion in the *AT&T Wireless/Cingular Merger Order* that "wireline services do not have a price constraining effect on mobile wireless services" overall and that only "some consumers . . . find that mobile wireless services are a good substitute for wireline services."[16] The absence of a price constraining effect is dispositive evidence that the services at issue should not be included in the same product market, even if "some customers" do view the products as substitutes.

The Commission nevertheless included wireless and wireline services in the same product market in the *Verizon/MCI Merger Order*, because (1) there was some increase in the

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[16] *See Verizon/MCI Merger Order* n.266 (citing *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd. 21522, ¶¶ 73-74 (2004) ("*AT&T Wireless/Cingular Merger Order*").

rate at which customers cut the cord; (2) Verizon considered the fact that some customers cut the cord when designing its wireline marketing campaigns; and (3) the FCC found in the *Sprint/Nextel Merger Order* that Sprint's marketing is targeted to encourage customers to cut the cord. *See Verizon MCI/Merger Order* ¶¶ 90-91. But none of these reasons is persuasive, especially in light of the Commission's conclusion regarding the absence of a price constraining effect.

For example, some increase in the rate at which customers cut the cord does not mean that *enough* customers view wireless and wireline services as substitutes to include them in the same market (i.e., to prevent a monopolist serving all wireline customers from profitably imposing a significant and non-transitory rate increase on wireline customers). In addition, the Commission's assertion that Verizon considers customers' cut-the-cord conduct when designing marketing campaigns was unexplained and unsupported. It is likely that Verizon only considers this issue as it pertains to the small minority of customers that actually consider wireline and wireless services to be substitutes (e.g., young people and the relatively poor), and that Verizon ignores the issue with regard to the vast majority of customers. Moreover, the Commission has not revisited its statements regarding possible future conduct by Sprint to determine the extent to which it has sought to convince, or has been successful in convincing, customers to cut the cord. Indeed, it is likely that the vast majority of Verizon customers will not forego their wireline service for Sprint's recent offer of unlimited mobile wireless minutes at $99.99 per month, because wireline customers can receive unlimited local and long distance calling for $46.99 in Rhode Island.[17] Furthermore, even if Sprint's marketing is focused on convincing customers to

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[17] *See* Verizon Communications Inc., Residential - Freedom Calling, http://www22.verizon.com/Residential/Templates/Products/ProductDisplay.aspx (last visited Mar. 27, 2008).

cut the cord, it is likely targeting this effort at the small subset of customers that might actually be open to this proposition, not the vast majority of customers.

A recent study released by Verizon shows that even it does not believe that wireless and wireline services are in the same product market and that the vast majority of customers do not plan to cut the cord.[18] The report found that "an overwhelming majority – including those who have a cell phone – say they plan to keep and continue using their landline home phone indefinitely . . . . Ninety-four percent of the respondents cited reliability and 91 percent cited safety as the key factors for retaining landline service." *Id.* Consumers perceive that landline service is superior to cell phone service on a number of metrics: "Three-quarters [of respondents] . . . said their landline home phone trumped their mobile phone in terms of voice quality, reliability and consistency of service." *Id.*

It is clear therefore that the Commission has not analyzed the extent to which wireless and wireline services are substitutes with adequate rigor, especially given the importance of this issue to this and other proceedings. Accordingly, the Commission must revisit this issue, and it should not include wireless services in the same product market as wireline service unless application of the DOJ/FTC guidelines yields the conclusion that this is the proper approach.[19]

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[18] Press Release, "Verizon, New Survey Shows 83 Percent of Consumers Continue to Rely on Landline Voice Service for Its Quality, Safety Features" (Mar. 27, 2008), http://newscenter.verizon.com/press-releases/verizon/2008/new-survey-shows-83-percent-of.html ("*Verizon cut-the-cord study*").

[19] Regardless of whether mobile wireless services are a replacement for landline voice service, in no event can mobile wireless service be included in the same product market as DS0-based xDSL services. This is so because, as has been explained in depth in the 6 MSA proceeding, mobile wireless broadband is both higher priced and has a lower bandwidth than xDSL services. *See* Letter from Thomas Jones, Counsel, Time Warner Telecom et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172, at 4-5 (filed Nov. 30, 2007).

Merely assuming that the services belong in the same product market because there has been some small measure of substitution is clearly unsound.

B. The FCC Should Exclude Customers Served *Via* Verizon's Wholesale Advantage Service From the Market Share Analysis.

The FCC must also reconsider its decision to include services offered via UNE-P replacement wholesale offerings (i.e., Verizon's "Wholesale Advantage" service) in the relevant market for the purposes of assessing whether to retain unbundling. As explained in more detail below with respect to special access, the FCC has held that, when considering whether to forbear from unbundling, it will not consider competition from service offerings whose prices are constrained by the availability of UNEs. *See 6-MSA Order* ¶ 38. The loop component of the Wholesale Advantage product (a loop/switching combination) is clearly constrained by the availability of unbundled DS0 loops. This is because, if Wholesale Advantage service were priced too high, competitors would have an incentive and ability to supply their own switching and combine it with a DS0 UNE loop. As with special access, therefore, customers served via UNE-P replacement products should be removed from the market share calculation.

C. The FCC Should Establish A Separate Market Share Test for the Residential And Business Markets.

In no event should the FCC consider market share data in the provision of services to residential customers in its assessment of whether to forbear from unbundling requirements for UNEs used to serve businesses (e.g., DS1 and DS3 loops). Market share must be developed separately for each relevant product market and, in all events, separately for services offered to business and residential customers.

Such an approach is consistent with the FCC's own analysis. The FCC acknowledged in the *6 MSA Order* that success in the residential market has little bearing on whether competitors can and do compete in the business market. Specifically, the FCC found that, despite fairly high

residential market shares of the cable companies, "the record lacks sufficient information for us to determine the cable operators' market shares for enterprise services, [and] we find that other evidence in the record demonstrates the comparatively limited role of the cable operators in serving enterprise customers in these MSAs today." *6-MSA Order* ¶ 37. In other words, the FCC understood that cable companies could make substantial headway in the residential market and not pose a competitive challenge in the business market. The FCC should follow its analysis to its logical conclusion and perform a separate market share analysis for business and residential markets.

IV. THE FCC SHOULD REJECT VERIZON'S PROPOSED CHANGES TO THE MARKET SHARE ANALYSIS.

Verizon asserts that the Commission should make several fundamental changes to the manner in which it conducts the market share analysis in forbearance proceedings, all of which would cause the Commission to grant forbearance in markets in which there is insufficient competition to protect consumers if unbundling of network elements no longer were required. The Commission should therefore reject all of these proposals.

A. The Commission should Reject Verizon's Assertion That Market Share Is Irrelevant To the Unbundling Forbearance Analysis

Verizon argues that the Commission should not consider measures of market share when assessing a request to forbear from unbundling requirements. There is no basis for this assertion.

In support of its argument, Verizon relies principally on its assertion that the FCC did not consider market share when assessing whether to forbear from unbundling in the *Omaha Order* or the *Anchorage Order*, and that the Commission's consideration of market share in the *6-MSA Order* was an unjustified departure from prior forbearance decisions. But even though this argument lacks merit, it should be addressed in the appeal of the *6-MSA Order*. Moreover, there is no doubt that it makes sense for the Commission, when assessing whether to eliminate core

unbundling requirements, to consider the extent to which competitors that do not rely on UNEs have been able to compete successfully in the market. Such an inquiry should be central to any determination under Section 10 as to whether retaining unbundling is "necessary to ensure that" an ILEC offers services on rates, terms and conditions are just and reasonable and is "necessary for the protection of consumers." *See* 47 U.S.C., §§ 160(a)(1)-(2).

B. To the Extent that Cut-the-Cord Customers Are Included In the Market Share Analysis At All, The FCC Should Continue to Count Such Customers Choosing Verizon Wireless As Belonging To Verizon.

As discussed above, cut-the-cord wireless customers should be excluded from the market share analysis altogether. However, even if cut-the-cord customers are counted in the market share analysis, the FCC should reject Verizon's argument that the FCC should change its prior approach and include Verizon Wireless' cut-the-cord customers in competitors' market share. Verizon makes two key arguments in support of its proposal, neither of which has merit.

First, Verizon asserts that "the relief sought here is for [its] wireline business, which is affected by losses to Verizon wireless the same as if those losses were to another competitive provider . . . [T]he competition that Verizon Wireless provides in wireless affects Verizon's wireline business, just as if Verizon Wireless were an unaffiliated competitor." Petition at 14-15. This argument makes no sense on its face. While it might be true that Verizon's wireline division would be hurt by losses to Verizon Wireless, Verizon Communications Inc. has a substantial interest in keeping Verizon's wireline customers from abandoning the Verizon family of companies completely. Because Verizon Wireless is half owned by Verizon Communications Inc., Verizon Wireless' profits directly benefit Verizon Communications Inc.'s bottom line.[20] To

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[20] *See* Verizon Communications Inc., 2007 Annual Report (Form 10-K), at 3 ("Wireless revenues were $43.9 billion, up more than 15 percent in 2007, driven by the tremendous 65 percent growth in data revenues from such services as text and picture messaging, video, music, and

argue that Verizon Wireless does not care which wireless providers its cut-the-cord customers choose is absurd.

Second, Verizon also asserts that its wireless affiliate has neither the incentive nor the ability to protect its wireline customer base from intermodal competition, "given the intense competition Verizon Wireless faces from other unaffiliated wireless offerings." Petition at 15. Verizon's assertion flies in the face of prior FCC findings that ILECs and their wireless affiliates have both the incentive and ability to work together to limit access line loss.[21]

Verizon has not even attempted to explain why the FCC's prior findings on this issue are no longer valid. Nor could it. The fact is that the two national wireless carriers with ILEC affiliates in the U.S., Verizon and AT&T, both target customers with smaller minute bucket wireless plans bundled with a wireline product so that their customers will use their wireless

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broadband access."). *See id.* at 26 (noting that Verizon Inc. owns 55 percent of Verizon Wireless with the remainder owned by Vodafone).

[21] In the *Sprint/Nextel Merger Order*, the FCC explained that,

> [T]he Commission determined in the *Cingular-AT&T Wireless Order* that a wireline-affiliated carrier would have an incentive to protect its wireline customer base from intermodal competition while an independent wireless carrier would not. The Applicants cite to service offerings and promotions their respective firms have undertaken that arguably have encouraged wireless substitution for wireline voice services. The Applicants present data that demonstrates that independent wireless carriers have a larger percentage of wireless-only customers than customers of ILEC-affiliated wireless carriers. Moreover, *there is no evidence that Sprint's or Nextel's mobile wireless strategies are influenced by a concern over any detrimental impact on subscription to wireline local exchange service.*

Id. ¶ 142 (emphasis added). *See also AT&T Wireless/Cingular Merger Order* ¶ 243 ("Thus, unlike Cingular whose strategies are influenced by SBC's and BellSouth's concerns about wireline revenues and access lines, AT&T Wireless is not likely to be concerned with the impact of its strategies on wireline revenues or access lines, except to the extent that they represent a potential source of new wireless customers. In fact, the documentary evidence indicates that AT&T Wireless sought to encourage mass market consumers to cut the cord.").